No. 47813-7-II

IN THE COURT OF APPEALS
STATE OF WASHINGTON

BRENNER MOTEL, LLC,

Respondent,

v.

BPO PROPERTIES, Ltd. and FIFE SERVICES, LLC,

Appellants.

BRIEF OF RESPONDENT

BRENNER MOTEL, LLC

James V. Handmacher, WSBA #8637
Morton McGoldrick, P.S.
Attorneys for Respondent
Brenner Motel, LLC
820 "A" Street, Suite 600
Tacoma, WA 98402
253-627-8131

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

INTRODUCTION

In December 1982, the predecessors of respondent Brenner Motel, L.L.C. (Brenner Motel) entered into a ground lease of property in Fife, Washington to the predecessors of appellants BPO Property Ltd. and Fife Services, LLC (BPO). At the time, inflation was running at about ten percent annually. The Lease had a term of 52 years. The starting rent was $5,700 per month, and increased annually by 5% per year for thirty years. At the end of thirty years, and each five years thereafter, the Lease required the parties to negotiate a fair market rental value for the premises, and if the parties could not agree, they could submit the matter to arbitration. The rent then increases 5% per year until the next adjustment. However, the Lease provided a rent floor, stating "but in no event shall the rents be less than the figures and formula used for the first three hundred sixty (360) months of this lease."

BPO's predecessor built a motel and restaurant complex on the leased property. At the end of the first thirty years of the Lease, the monthly rent was $23,461.96. BPO asserted that the fair market rental value at the time was less than $5,700, that the rent floor under the Lease was the starting rent of $5,700, and that the rent for the thirty-first year should be reduced to that $5,700. Brenner Motel acknowledged that the fair market rent was less than the current monthly rent, but asserted that

the rent floor was the starting rent of $5,700 increased by 5% per annum for thirty years, and thus the rent should remain unchanged in the thirty-first year.

BPO demanded arbitration. The arbitrator determined that the fair market rental value was $9,887.50. Brenner Motel then brought this action for a declaratory judgment that the rent owed under the Lease is not less than the rent floor of $23,461.96 per month for the remainder of the lease term, and that the rent owed for the thirty-first year of the Lease commencing May 1, 2013 is $23,461.96 per month.

Brenner Motel moved for summary judgment. The trial court rejected BPO's argument that the Lease could be reasonably interpreted to set a rent floor equal to the starting rent thirty years ago. The trial court concluded that the only reasonable interpretation of the Lease which gives meaning to all of the language in the rent floor clause is that the rent shall not be less than the starting figure of $5,700 increased by 5% per year for the first thirty years of the lease. That amount of $23,461.96 per month is the rent floor. Since the rent floor is greater than the fair market value, the rent floor is the rent for the thirty-first year of the Lease. The trial court entered judgment accordingly, including an award of attorney fees to Brenner Motel as the prevailing party.

STATEMENT OF THE CASE

1. Formation of the Lease.

In 1982, Charles Woodke, III and Lona Woodke owned undeveloped property on Pacific Highway in Fife. CP 85. They were approached by William F. Brenner and Lorene Brenner to lease the property and construct a motel on it. CP 85.

William Brenner prepared the first draft of a lease for the property, proposing a 60-year term with monthly rent of $2,500 throughout the lease term plus six percent of the annual gross room revenue over $7,500. CP 85. The Woodkes' attorney Elvin Vandeberg prepared revisions to the lease. CP 85. Mr. Woodke wanted a higher monthly rent without percentage rent, with annual increases in the monthly rent equal to increases in the consumer price index. CP 86. Mr. Brenner wanted a fixed amount of rent for their financing, and asked for annual increases of 5% rather than an uncertain consumer price increase during the 30-year term of their financing. CP 86. Mr. Woodke agreed to the fixed 5% annual increase. CP 86. At that time the consumer price index was averaging around 10% annually, so Mr. Woodke felt that a 5% annual increase was a major concession by him. CP 86. In exchange, Mr. Woodke proposed a market value adjustment of the rent after thirty years, which was the end

of Brenners' proposed financing, with the stipulation that the rent would not go down at that time. CP 86.

The Woodkes and the Brenners signed a lease dated December 1, 1982, which is the subject of this action (hereinafter the "Lease"). CP 86. The Lease required the Brenners to develop the leased property with a motel and restaurant complex. CP 86. The term of the Lease was for 52 years with fixed annual rent, a 5% annual increase in the rent, and a market value adjustment of the rent after thirty years with the stipulation that the rent would not go down at that time. CP 86.

2. Parties to the Lease.

In April 1984, the Woodkes consented to Brenners' assignment of their interest in the Lease to Columbia River Service Corporation (CRSC). CP 86. CRSC was a wholly owned subsidiary of Pacific First Bank. CP 86. In October 1990, Lona Woodke transferred her interest in the leased property to her husband Charles Woodke, III. CP 86.

On or about July 31, 2000, Mr. Woodke consented to an assignment of the Lease from CRSC to Gentra, Inc. (now called BPO Properties, Ltd.). CP 86. At that same time, Mr. Woodke, CRSC, and Gentra, Inc. entered into a First Amendment to the Lease. CP 86-87.

On or about December 29, 2000, Mr. Woodke transferred his interest in the property to the appellant limited liability company, Brenner

Motel, L.L.C. CP 87. After the initiation of this lawsuit, appellant BPO Properties Ltd. requested and Brenner Motel L.L.C. consented to an assignment of the Lease from BPO Properties Ltd. to appellant Fife Services, LLC. CP 87. Fife Services LLC is a wholly owned subsidiary of BPO Properties Ltd. CP 87. Thus the lessor is now the respondent Brenner Motel L.L.C. and the lessee is the appellant Fife Services LLC. CP 87. However, pursuant to the terms of the Lease, assignment of the Lease to Fife Services LLC does not release appellant BPO Properties Ltd. from its obligations under the Lease. CP 87, 113-114.

BPO Properties Ltd. is a wholly owned subsidiary of Brookfield Office Properties, Inc. CP 60, 80. BPO Properties Ltd. owns, develops and manages premier commercial office properties in Canada. CP 60, 80. In 2013, its commercial property portfolio consisted of interests in 28 properties totaling 20.7 million square feet. CP 60, 80. Its development portfolio comprised six development sites totaling 5.5 million square feet. CP 60, 80.

Brookfield Office Properties, Inc. is a publicly held company listed on the NYSE. CP 60, 81. It owns, develops and manages office properties in the United States, Canada, and Australia. CP 60, 81. In 2013, its portfolio was comprised of interests in 110 properties totaling 76 million square feet in the downtown cores of New York, Washington, D.C.,

Houston, Los Angeles, Denver, Seattle, Toronto, Calgary, Ottawa, London, Sydney, Melbourne, and Perth. CP 60, 81. At the end of 2013, it reported assets in excess of $30 billion, and net income of $1.222 billion. CP 60, 83-84.

3. Relevant provisions of the Lease.

Pursuant to paragraph 2 of the Lease, the lease term commenced May 1, 1983. CP 89-90. Paragraph 3(a) of the Lease states that the Lessee shall pay base rent of $5,700 per month for the first twelve months of the lease term. CP 90. That section also provides that the base rent shall increase by 5% of the previous year's rent for each subsequent year, except for those years when the rental is adjusted pursuant to paragraph 3(d). CP 90.

Paragraph 3(d) of the Lease states as follows:

> Six (6) months prior to the end of the first three hundred (360) months of the lease term and six (6) months prior to the end of each five (5) years of the lease term thereafter, Lessor and Lessee shall negotiate a fair market rental value for the leased premises as of that date. If the parties cannot agree on the fair rental value of the leased premises, then the matter shall be submitted to arbitration in the manner provide in paragraph 15 of this lease. The rental so determined shall be the base rental to be paid for the next twelve (12) calendar months of the lease term, and said base rental shall be increased at the expiration of the first full twelve (12) calendar months and each year thereafter by five percent (5%) of the previous year's rental; provided, however, that the five percent (5%) increase shall not be applied to the base rental for the first twelve (12)

> calendar months after an adjustment in the base rental pursuant to this subparagraph (d); but in no event shall the rents be less than the figures and formula used for the first three hundred sixty (360) months of this lease.

CP 90.

Paragraph 15 of the lease states that arbitration of the fair market rental value of the property as provided in paragraph 3 shall be submitted for arbitration under the authority of the commercial rules of arbitration of the American Arbitration Association. CP 103.

The end of the first 360 months (30 years) of the lease was April 30, 2013. In April 2013, the last month of the first 360 months of the lease, the Lease provided for rent in the amount of $23,461.98. CP 414.

4. Proceedings prior to litigation.

By letter dated March 7, 2013, BPO Properties stated that it has been advised by expert appraisers that the fair market value of the leased premises is "considerably less than $5,700/month" (the original rent from thirty years ago). CP 62. BPO Properties acknowledged that under the last clause of paragraph 3(d) of the Lease, the monthly rent cannot be less than the figures and formula used for the first three hundred sixty (360) months of this lease. CP 62. BPO Properties stated that its "interpretation of that language is that the 'figure' used for the first 30 years of the Term of the Ground Lease is truly $5,700.00/month and the 'formula' used for

the first 30 years of the Term is that, after the first year of the first 30 years of the Term and after the first year of each subsequent 5-year period, the month rent shall be increased by 5% per year." CP 62. BPO Properties concluded that the lease provision means that the rent cannot be less than $5,700 per month, and offered to pay that amount going forward. CP 62-63. BPO Properties stated that if the landlord disagreed, BPO Properties wanted to submit the issue of fair market rental value to arbitration. CP 63.

By letter dated March 12, 2013, Brenner Motel disagreed with the idea that the monthly rent for the leased premises would revert to the rent paid at the inception of the Lease thirty years ago. CP 66. Brenner Motel conceded that the fair market rental value was less than the $23,461.98 monthly rate being paid at that time. CP 66. However, Brenner Motel asserted that the Lease language that "in no event shall the rents be less than the figures and formula used for the first three hundred sixty (360) months of this lease" means that the rent after the first 360 months shall not be less than the rent as calculated for the first 360 months using the formula set forth in the Lease. CP 67. The figures and formula used for the first 360 months are $5,700 increased by 5% per year. CP 67. If, at the end of 360 months, the fair rental value was greater than the amount then being paid, then the rent would be adjusted to that amount and

increase 5% per year thereafter. CP 67. But in no event will the rent after the first 360 months be less than the rent at the end of the first 360 months. CP 67. Since all parties agreed that the fair market rental value was not higher than the floor set by the lease, Brenner Motel asserted that arbitration to determine the fair market rental value was not necessary. CP 67.

By letter dated April 8, 2013, BPO Properties stated that "the parties have a fundamental disagreement about what is meant by the text in Section 3(d) of the Ground Lease referring to the 'figures and formula' used to calculate the monthly rent amount following the initial 360-month term," and that "we are at an impasse on this critical issue." CP 69.

On September 6, 2013, BPO Properties filed a demand for arbitration with the American Arbitration Association. CP 72. The demand was limited to determination of the fair market rental value of the leased premises under paragraph 3 of the lease. CP 72.

The arbitrator issued his final arbitration award on October 2, 2014. CP 60. The arbitrator held that the fair market rental value of the leased premises as of May 1, 2013 was $9,887.50. CP 60.

5. Proceedings during this litigation.

On June 14, 2014, Brenner Motel filed a complaint for declaratory judgment, asking the court to determine that the rent owed under the Lease

for the remaining term would not be less than the amount owed in the thirtieth year of the Lease. CP 5. After BPO Properties, Ltd. assigned its interest in the Lease to its wholly-owned subsidiary, Fife Services, LLC, Brenner Motel filed a second-amended complaint adding Fife Services. CP 28. BPO's answer included a counterclaim also asking the court to enter declaratory judgment determining the effect of the rent floor clause of the Lease. CP 36. No party filed a jury demand.

On April 24, 2015, Brenner Motel filed a motion for summary judgment. CP 49. On May 22, 2015, the trial court granted summary judgment. CP 460. The court held that the only reasonable interpretation of the Lease that gives meaning to all of the language in the rent floor clause is that the rent shall not be less than the starting rent of $5,700 increased by 5% per annum for the first thirty years, which is $23,461.96. RP 22-23. The summary judgment also determined that the rent owed for the thirty-first year is $23,461.96 per month, which will increase by 5% per year thereafter until April 30, 2018, and that Brenner Motel is the prevailing party for an award of attorney fees and costs. CP 460. Final judgment including an award of attorney fees and costs was entered on June 24, 2015. CP 466.

ARGUMENT

A. Summary judgment was properly granted where there is only one reasonable interpretation of the contract language.

Appellate courts review an order granting summary judgment de novo. *Briggs v. Nova Services*, 166 Wn. 2d 794, 801, 213 P.3d 910, 914 (2009). Under CR 56(c), summary judgment is appropriate if the record presents no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. *Id.* The court must view all facts, and draw reasonable inferences therefrom in the light most favorable to the nonmoving party. *Id.*

In *GMAC v. Everett Chevrolet, Inc.*, 179 Wn. App. 126, 134-35, 317 P.3d 1074 (2014), *review denied,* 181 Wn.2d 1008 (2014), the Court applied the principles of summary judgment in a case of contract interpretation:

> "The 'touchstone of contract interpretation is the parties' intent.' " "Washington courts follow the objective manifestation theory of contracts, imputing an intention corresponding to the reasonable meaning of the words used."
>
> "An interpretation which gives effect to all of the words in a contract provision is favored over one which renders some of the language meaningless or ineffective." A court will not read ambiguity into a contract " 'where it can reasonably be avoided.' "
>
> Whether a contract is ambiguous is a question of law. A contract provision is not ambiguous merely because the

> parties to the contract suggest opposing meanings. "If only one reasonable meaning can be ascribed to the agreement when viewed in context, that meaning necessarily reflects the parties' intent; if two or more meanings are reasonable, a question of fact is presented." Summary judgment as to a contract interpretation is proper if the parties' written contract, viewed in light of the parties' other objective manifestations, has only one reasonable meaning.

[citations omitted] *See also, Mayer v. Pierce County Medical Bureau, Inc.*, 80 Wn. App. 416, 420-21, 909 P.2d 1323 (1995).

The trial court correctly determined that the contract language at issue in this case has only one reasonable meaning, and granted summary judgment to Brenner Motel. For the first time on appeal, BPO argues that the meaning of the contract language should have been left to a jury.[1] However, both parties requested a declaratory judgment from the court, and neither party filed a jury demand. CP 28, 36. BPO's failure to demand a jury constitutes a waiver of trial by jury. CR 38(d).

BPO cites the following language from *Kries v. WA-SPOK Primary Care, LLC*, No. 32879-1-III, 2015 WL 5286176, at *10 (Wash. Ct. App. Sept. 10, 2015):

> On the other hand, the trial court should deny a summary judgment motion regarding interpretation of a contract provision when (1) the interpretation depends on the use of extrinsic evidence or (2) more than one reasonable inference can be drawn from the extrinsic evidence.

[1] Appellant's brief, pp. 3, 26, 37, 39.

Kries cited to *Scott Galvanizing, Inc. v. Northwest EnviroServices, Inc.*, 120 Wn.2d 573, 582, 844 P.2d 428 (1993), in support of that statement, but misstated the rule of that case. In *Scott Galvanizing, supra,* the Court stated summary judgment interpreting a contract provision was appropriate "when (1) the interpretation does not depend on the use of extrinsic evidence or (2) only one reasonable inference can be drawn from the extrinsic evidence." Thus, summary judgment is appropriate either when it does not depend on extrinsic evidence, or there is only one reasonable inference from the extrinsic evidence. As reworded by the Court in *Kries*, summary judgment cannot be granted whenever it depends on extrinsic evidence, so it does not matter if there is only one reasonable inference from that extrinsic evidence. This is clearly incorrect.

Under *Scott*, the court can grant summary judgment on an issue of contract interpretation if the interpretation does not depend on extrinsic evidence. The court can also grant summary judgment on an issue of contract interpretation if it considers extrinsic evidence, but there is only one reasonable interpretation that can be drawn from that extrinsic evidence.

In the case at bar, whether or not the limited extrinsic evidence is considered, there is only one reasonable interpretation of the rent floor clause in the Lease.

B. Applying established principles of contract interpretation, there is only one reasonable interpretation of the rent floor clause.

In *Viking Bank v. Firgrove Commons 3, LLC*, 183 Wn. App. 706, 712-13, 334 P.3d 116, 120 (2014), this Court listed the principles of contract interpretation:

1. The primary objective in contract interpretation is to ascertain the mutual intent of the parties at the time they executed the contract.
2. Washington follows the "objective manifestation theory" of contract interpretation, under which the focus is on the reasonable meaning of the contract language to determine the parties' intent.
3. Words in a contract are generally given their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent.
4. The contract is viewed as a whole, interpreting particular language in the context of other contract provisions.
5. To assist in determining the meaning of contract language, courts also apply the "context rule" which allows examination of the context surrounding a contract's execution, including the consideration of extrinsic evidence to help understand the parties' intent.
6. However, extrinsic evidence is to be used to determine the

meaning of specific words and terms used and not to show an intention independent of the instrument or to vary, contradict or modify the written word.

7. If a contract provision's meaning is uncertain or is subject to two or more reasonable interpretations after analyzing the language and considering extrinsic evidence (if appropriate), the provision is ambiguous.
8. Ambiguities are generally construed against the contract's drafter, but if the drafter is unknown or if the parties drafted the contract together, courts will adopt the interpretation that is the most reasonable and just.

This Court has also held that a contract provision is not ambiguous merely because the parties suggest opposing meanings. *Mayer v. Pierce County Medical Bureau, Inc.*, 80 Wn. App. 416, 421, 909 P.2d 1323, 1326 (1995). Ambiguity will not be read into a contract where it can be reasonably avoided. *Id.*

"The first and best resort in the construction of contracts is to put oneself in the place of the parties at the time the contract was executed; to look at it in prospect rather than in retrospect, for when money disputes have arisen the perspective is apt to be clouded by the unexpected chance

of gain or self-interest." *Carnation Lumber & Shingle Co. v. Tolt Land Co.*, 103 Wash. 633, 639, 175 P. 331, 333 (1918).

Starting with the language used by the parties, paragraph 3(d) of the Lease provides that at the end of the first 360 months (30 years) of the lease term, the rent shall be adjusted to the fair market rental value determined either by agreement or by arbitration. However, at the end of that paragraph 3(d), it states "but in no event shall the rents be less than the figures and formula used for the first three hundred sixty (360) months of this lease."

There has never been any dispute that the fair market rental value at the end of the first 360 months (May 1, 2013) was less than the monthly rent of $23,461.98 that was due in the last year of the first thirty years.[2] That was stated in the correspondence between the parties in March and April, 2013. CP 62, 66, 69. That was confirmed by the arbitration award.

The parties also agree that the last clause of paragraph 3(d) sets a rent floor. That rent floor clause states that the rent after the first 360 months shall not be less than the rent as calculated for the first 360 months using the figures and formula in the Lease. The figures and formula used

[2] Through its own clerical error, BPO erroneously paid $24,635.08 from December 1, 2012 through April 1, 2013, when it should have been paying $23,635.08. CP 414. As a result, until this error was discovered during the summary judgment proceedings, both parties erroneously stated that the rent at the end of the first thirty years was $24,635.08. This error was acknowledged by both parties and the correct rent was stated in the final judgment as $23,635.08. CP 414, 446, 460, 467.

for the first 360 months are $5,700 for the first year increased by 5% per year. At the end of the first 360 months, that amount was $23,461.98 per month. If, at the end of 360 months, the fair rental value was greater than $23,461.98 per month, then the rent would be adjusted to that higher amount and increase 5% each year thereafter. If the fair market value is less than $23,461.98 per month, then the rent for the thirty-first year will be $23,461.98 per month and increase 5% each year thereafter. This is the only interpretation that gives meaning to all of the language in the rent floor clause.

This interpretation also makes sense from the perspective of the parties at the time the lease was signed. The rent escalator clause increased the rent by 5% per year for the first 30 years. At the time the lease was signed in 1982, the consumer price index was averaging around 10% annually. CP 86. In fact, for the ten years from 1973-1982 preceding the execution of the Lease, the consumer price had increased over 5% every year. CP 408. If that pattern continued, the landlord was facing the prospect of rent significantly below market value after 30 years. The adjustment to fair market value would correct that discrepancy for the final 22 years of the lease. The purpose of the rent floor clause was to ensure that the landlord would retain the escalation for the first thirty years.

C. BPO's proposed interpretation of the rent floor clause renders some of the language meaningless or ineffective, and leads to an absurd result.

As stated in *GMAC, supra.*, "An interpretation which gives effect to all of the words in a contract provision is favored over one which renders some of the language meaningless or ineffective."

BPO Properties asserts that the rent floor is simply $5,700, the amount of rent at the beginning of the Lease. This ignores the language in the rent floor clause that says the rent shall not be less than "the figures and formula used for the first thirty years." The only "formula" used for the first thirty years is the annual rent escalation of 5%. BPO's proposed interpretation, that the rent floor is simply the starting figure of $5,700 without any escalation, renders some of the language of the rent floor clause meaningless or ineffective.

Contracts should be given a practical and reasonable interpretation, not a strained or forced construction leading to absurd results. *Eurick v. Pemco Insurance Co.*, 108 Wn. 2d 338, 341, 738 P.2d 251 (1987). It is absurd to conclude that the parties intended to establish a rent floor thirty years into the lease term that would be equal to the rent at the beginning of the Lease. Since the rent at the end of thirty years is the greater of the fair market rent or the rent floor, under BPO's reasoning the rent floor would only apply where the fair market rent after thirty years is less than the

initial rent. Continuous deflation over a period of thirty years is unprecedented and completely unrealistic. It was certainly not within the reasonable expectations of the parties who signed the lease during a time of ten percent annual inflation.

D. Brenner Motel did not insert the language "at the end of" into the rent floor clause; it is implicit in the clause itself.

BPO goes to great lengths to argue that Brenner Motel made a concerted effort to insert the phantom phrase "at the end of the first 30 years" into the rent floor clause. This language is not "inserted" by Brenner Motel, it is implicit in the rent floor itself. The Lease states that the rent will be adjusted to fair market rent at the end of the first 360 months (30 years). It says that the rent will not be adjusted to be less than the figures and formula used for the first 360 months of the Lease. Thus, the rent floor clause on its face takes effect at the end of the first 30 years. If the rent floor is determined by the figures and formula used for the first 360 months, then that amount is $5,700 increased by 5% a year for 30 years, or $23,635.08.

E. A rent floor is always intended to protect the landlord.

BPO asserts that the history of the Lease negotiation shows that the lessee (BPO's predecessor) proposed a fair market value adjustment. BPO then argues that since this fair market adjustment was so important to the

lessee, it makes no sense that the lessee would have agreed to a rent floor greater than the fair market value. Both the premise and the conclusion are patently incorrect.

First, there is no evidence that the lessee proposed the fair market rent adjustment. BPO asserts that the history of the lease negotiations show that the lessee proposed the fair market value adjustment. Appellant's Brief, p. 31. Though it makes no citation to the record to support that assertion, it can only be based on the testimony of Mr. Woodke, the only person who has personal knowledge of that history. Mr. Woodke stated the exact opposite of what BPO asserts. Mr. Woodke states that Mr. Brenner proposed rent based on a percentage of revenues. CP 85. Mr. Woodke countered with a proposal for increases tied to the consumer price index. CP 86. Mr. Brenner wanted certainty as to the annual adjustments and proposed a fixed annual increase of 5%. CP 86. Mr. Woodke then proposed a fair market value adjustment, not Mr. Brenner. CP 86. Mr. Woodke conditioned that proposal on the stipulation that the rent would not go down. CP 86. There is no evidence in the record that Mr. Brenner proposed the fair market rental adjustment.

BPO argues that it makes no sense that the lessee would have agreed to a rent floor that can only benefit the landlord. Appellants' Brief, p. 32. By definition, a rent floor is intended to benefit the landlord, since

it sets a minimum threshold below which rent cannot go. A tenant would never want to set a rent floor. What makes no sense is to suggest that a rent floor was intended to benefit both landlord and tenant.

Inserting a fair market value adjustment, with a rent floor equal to the starting rent escalated at 5% for the first thirty years, protected the landlord from significant underpayment of rent. If property values increase by more than 5% per year, the rent will adjust to that fair market rent after thirty years. The landlord will have been underpaid for the first thirty years, but will receive fair compensation thereafter. If property values increase by less than 5% a year, the landlord will be assured of the escalation that occurred during the first thirty years, which is the rent floor throughout the remainder of the Lease. This interpretation actually gives meaning and purpose to the rent floor clause.

BPO also asserts that Mr. Woodke used intentionally imprecise language instead of inserting a specific rent amount that he could easily calculate. There was no obligation for the parties to use a fixed number instead of a formula. The formula does not hide the result. If Mr. Woodke could easily calculate the rent that would be paid in thirty years, as asserted by BPO, so could Mr. Brenner.

Defendants assert that a fixed number for the rent floor in the lease would have alerted Mr. Brenner that, despite the perceived safety of the

fair market rental value determination, the lease rate will never reset to a number that would benefit anyone but Mr. Woodke. This is wrong on several levels. First, a fixed number for the rent floor would have provided no more notice of future rent than the formula, since Mr. Brenner could have easily calculated the number from the formula. Second, the rent may reset to an amount that benefits the lessee during the remaining term of the Lease. The rent increases 5% per annum from lease years 32-35. If, at the time of the next rent adjustment in the thirty-sixth year, the fair market rental value is still less than the rent floor, the rent will roll back to that rent floor. That could occur at every five-year rent adjustment for the remaining twenty-two years of the Lease. This would clearly benefit the lessee.

Further, there is no reason the rent adjustment and rent floor provisions should not benefit the landlord. Mr. Woodke proposed the fair market rental adjustment to protect against annual inflation exceeding the five percent annual adjustment in the Lease. It was to protect the landlord, not the tenant. It is not inappropriate that the rental value market adjustment would only benefit the landlord. The parties are free to negotiate any lease terms that they choose. Courts do not have the power, under the guise of interpretation, to rewrite contracts the parties have deliberately made for themselves, or substitute their judgment for that of

the parties. *McCormick v. Dunn & Black, P.S.*, 140 Wn. App. 873, 891, 167 P.3d 610 (Div. 2, 2007), *review denied,* 163 Wn.2d 1042 (2008).

Setting the rent floor thirty years into the Lease equal to the initial rent would have provided no benefit to either party. Neither party could have reasonably anticipated that fair market rents would go down over a thirty year period. Since the rent floor only takes effect if it exceeds fair market rent, it would only take effect if fair market rent decreased below the initial rent over a thirty year period. The contract cannot be construed to lead to this absurd result.

Finally, BPO argues that its interpretation of the rent floor clause is "reasonable and just" and the trial court's interpretation is not. BPO argues that the trial court's interpretation is not reasonable and just because it results in rent greater than fair market value. But the parties agreed to a rent floor. The only purpose for the rent floor is to provide for rent in excess of fair market value. If the parties intended that the rent would be no more than fair market value, they would not have included any rent floor. For a court to conclude that the discrepancy between the fair market value and the rent floor is too great would be to substitute the court's judgment for the judgment of the parties, and to rewrite the contract. The court does not have that power. *McCormick v. Dunn & Black, P.S., supra.*

Though BPO claims that this results in a windfall for Brenner Motel, that is only with the benefit of hindsight. Viewing the issue from the perspective of the parties at the time the Lease was signed, when inflation was running at 10%, there was a good chance that the 5% annual increases would be woefully inadequate, and the landlord could have lost a substantial amount over the first 30 years. The parties balanced the risks between them, and a court cannot rebalance the risks after the fact.

F. The mutual mistake by the parties in the amount of the rent paid in the last six months has no impact on the issue before the court.

BPO asserts that Brenner Motel miscalculated the rent owed during the last year, and that this shows "that the calculations are ambiguous." Actually, BPO stated under oath that it miscalculated the rent during the last year due to its clerical error. (see footnote 2, *supra*, at page 16) Moreover, this clerical error by BPO does not render the rent floor language ambiguous. Language is only ambiguous if it is susceptible to two reasonable interpretations. *Viking Bank, supra.* The clerical error in calculating the rent, which both parties acknowledge, was not based on different interpretations of the rent floor language. The period of time during which the math error occurred is prior to the end of the first thirty years when the rent floor takes effect.

G. Since both parties participated in drafting the lease, there is no basis to construe it in favor of one party.

BPO argues that the language of the Lease is ambiguous and should be construed against the drafter, and that Mr. Woodke is the drafter of the Lease. The evidence before the Court is that the parties both participated in the drafting of the lease. CP 85-86. As stated in *Viking Bank, supra*, if the parties drafted the contract together, courts will adopt the interpretation that is the most reasonable and just.

BPO also asserted that Mr. Woodke testified in his deposition that he does not recall discussing the rent floor clause with Mr. Brenner. Appellants' brief, p. 9. That is incorrect. In his deposition, Mr. Woodke gave the following answers:

> Q. So I understand, did you or did you not have a conversation with Mr. Brenner about this specific language?
> A. Yes.
> Q. What was the conversation with Mr. Brenner?
> A. We were discussing terms and conditions, and this is just a part of the terms and conditions of the lease.

CP 299-300.

H. Brenner Motel has articulated the only reasonable interpretation of the rent floor language.

Finally, BPO says there are two reasonable interpretations of the rent floor clause, and a question of fact is presented. As noted above, the language is ambiguous, and a question of fact presented, only if there are

two reasonable interpretations. BPO has not put forth any reasonable alternative interpretation of the rent floor language. The trial court concluded that that the only interpretation of the rent floor language that is reasonable and gives meaning to all of the words is the interpretation argued by Brenner Motel, and thus summary judgment is appropriate. The trial court is correct and should be affirmed.

I. This Court determines the admissibility of evidence de novo.

BPO argues that since the trial court entered an order striking portions of the declaration of Charles Woodke, and Brenner Motel did not cross-appeal that order, and this Court cannot consider those portions because they are not part of the appellate record. Appellants' Brief, p. 16. However, this Court determines de novo the admissibility of evidence, no cross-appeal is necessary, and BPO has waived its objection to the evidence.

In response to BPO's motion to strike, Brenner Motel pointed out to the trial court that a motion to strike is not appropriate, citing the following language in *Cameron v. Murray*, 151 Wn. App. 646, 658, 214 P.3d 150, 157 (2009):

> [M]aterials submitted to the trial court in connection with a motion for summary judgment cannot actually be stricken from consideration as is true of evidence that is removed from consideration by a jury; they remain in the record to

> be considered on appeal. Thus, it is misleading to denominate as a "motion to strike" what is actually an objection to the admissibility of evidence that could have been preserved in a reply brief rather than by a separate motion.

CP 452. As stated by the Supreme Court in *Folsom v. Burger King*, 135 Wash. 2d 658, 663, 958 P.2d 301, 305 (1998):

> An appellate court engages in the same inquiry as the trial court when reviewing an order for summary judgment. An appellate court would not be properly accomplishing its charge if the appellate court did not examine *all* the evidence presented to the trial court, including evidence that had been redacted. The de novo standard of review is used by an appellate court when reviewing all trial court rulings made in conjunction with a summary judgment motion.

[citations omitted] In *Keck v. Collins*, 181 Wn. App. 67, 81, 325 P.3d 306, 313 (2014), *affirmed but criticized on other grounds,* 184 Wn. 2d 358, 357 P.3d 1080 (2015), the Court said:

> an appellate court cannot fully engage in the same inquiry as the trial court ... unless the appellate court evaluates anew all evidence available to the trial court for potential consideration on summary judgment.

A separate cross-appeal is not necessary for this Court to review the admissibility of the portions of the Woodke declaration objected to by BPO. The appellate court will review a trial court order or ruling not designated in the notice of appeal if the order or ruling prejudicially affects the decision designated in the notice. RAP 2.4(b). "Thus, in more practical terms, an appeal from the final judgment or decree brings up for

review all the usual decisions made in the course of trial—rulings on evidence, decisions regarding jury instructions, and so forth—so long as they prejudicially affect the final judgment and are not harmless." 2A Washington Practice, Rules Practice, RAP 2.4 (7th ed.). Thus, this Court determines de novo whether the evidence is properly before the Court.

BPO has waived any argument that the evidence in the Woodke declaration is not admissible. A party waives its objection to the admission of incompetent evidence by subsequently using it for his own purposes. *Sevener v. Northwest Tractor & Equipment Corp.*, 41 Wn. 2d 1, 15, 247 P.2d 237, 245 (1952). In its motion to strike, BPO objected to testimony in paragraph 3 of the Woodke declaration. CP 432-433. However, on appeal, BPO cites to some of that same language in support of its arguments. Appellant's Brief, pp. 30-31.[3] By using the testimony in paragraph 3 of Woodke's declaration for its own purposes, BPO has waived its objection to the admissibility of that testimony.

J. Brenner Motel is entitled to an award of fees and costs on appeal.

Section 25 of the Lease, as modified by the First Amendment, states that if it is necessary for either party to employ an attorney to file an

[3] BPO erroneously cites to CP 86, ¶ 4 for the language in Woodke's declaration "a market value adjustment of the rent after thirty years, which was at the end of Brenner's proposed financing, with the stipulation that the rent would not go down at that time." That language is actually contained in paragraph 3 at lines 7-9.

action to enforce any terms, conditions or rights under the Lease, the prevailing party shall be entitled to recover its reasonable attorney fees, costs and expenses. CP 114. In granting summary judgment to Brenner Motel, the trial court held that it was the prevailing party for an award of costs and reasonable attorney fees. CP 461. For the same reason, Brenner Motel is entitled to recover its costs and reasonable attorney fees on appeal in an amount to be determined by this Court. *Salewski v. Pilchuck Veterinary Hosp., Inc., P.S.*, 189 Wn. App. 898, 359 P.3d 884, 891 (2015)("A contract which provides for attorney fees to enforce a provision of the contract necessarily provides for attorney's fees on appeal").

CONCLUSION

The trial court correctly determined that the only reasonable interpretation of the rent floor provisions of the Lease is that the rent after the first thirty years of the Lease cannot be less than amount determined under the figures and formula of the Lease for the first thirty years. That amount is $23,461.96 per month. The trial court properly granted summary judgment determining that the rent owed under the Lease is not less than $23,461.96 per month for the remainder of the lease term, that this amount of rent is owed during the thirty-first year of the Lease term, and that this amount will increase by five percent for each year until the next rent adjustment period. This Court should affirm that summary

judgment and award judgment to Brenner Motel for its reasonable attorney fees, costs and expenses incurred in this appeal.

RESPECTFULLY SUBMITTED this 21st day of December, 2015.

s/James V. Handmacher
JAMES V. HANDMACHER, WSBA #8637
Morton McGoldrick, P.S.
Attorneys for Respondent
Brenner Motel, LLC

CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

I am employed by the law firm of Morton McGoldrick, P.S.

At all times hereinafter mentioned, I was and am a citizen of the United States of America, a resident of the state of Washington, over the age of eighteen (18) years, not a party to the above entitled action, and competent to be a witness herein.

On December 21, 2015, I served in the manner noted the document(s) entitled: Brief of Respondent Brenner Motel, L.L.C. on the following person(s):

Jesse O. Franklin IV John S. Wilson K&L Gates LLP 925 Fourth Avenue, Ste. 2900 Seattle, WA 98104-1158	[ ] U.S. Mail [ ] Facsimile [ ] Messenger [x] E-Mail per agreement: jesse.franklin@klgates.com; john.wilson@klgates.com; kathy.schwarz@klgates.com;

DATED this 21st day of December, 2015, at Tacoma, Washington.

MORTON McGOLDRICK, P.S.

s/James V. Handmacher
JAMES V. HANDMACHER